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INTEGRATION, RECONSTRUCTED

OLATUNDE C.A. JOHNSON†

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INTRODUCTION

Racial integration is often cast as irrelevant to the contemporary project of ensuring racial equity in education. The day after the Supreme Court's decision in *Parents Involved v. Seattle School District No. 1*,¹ holding unconstitutional the voluntary racial integration programs in Seattle, Washington and Jefferson County, Kentucky, a prominent popular commentator urged the public not to "mourn *Brown v. Board of Education*": *Brown* should be praised, Juan Williams argued, but ultimately "bur[ied]."² Desegregation is irrelevant to addressing the high dropout rates of black and Latino high school students, or the racial and ethnic achievement gap, Williams contended, both because of the futility of achieving integration (given current patterns of residential segregation), and because racial malice could no longer explain the inferior quality of schooling for

† Associate Professor, Columbia Law School. This paper builds on remarks that I made at *Moving Education Forward*, the *Duke Forum for Law & Social Change* conference on educational equity held on February 13, 2009. I am indebted to Aslihan Bulut of the Columbia Law Library, Diana Blank, Adia Gross, and Jessica Leinwand for their wonderful research assistance, and to Chinh Le for his thoughtful comments and suggestions. In addition, I am very grateful to the Clifford Chance Diversity Thought Leadership Program for funding part of the research for this paper.

1. 127 S. Ct. 2738 (2007).

2. Juan Williams, *Don't Mourn Brown v. Board of Education*, N.Y. TIMES, June 29, 2007, <http://www.nytimes.com/2007/06/29/opinion/29williams.html>.

minority children. Arguments for integration that depend on the diversity rationale—that integration prepares students to live and work in a pluralistic society—were “spent,” Williams argued.³ Rather, the focus should be on providing students the core skills necessary to participate in the global economy.⁴

These comments raise familiar criticisms about racial integration: that it is neither achievable nor material to the current important questions in education.⁵ Belief in the futility of the quest for integration certainly derives support from demographic realities. Current levels of school segregation remain high for both blacks and Latinos, and progress since the 1970s has been slowing.⁶ Academic commentators have long debated the extent to which racial integration remedies, such as mandatory school assignments and busing, have been counterproductive, hastening white flight and the ultimate resegregation of schools.⁷ And, even apart from the debates about the unintended effects of race-based school assignment policies, most commentators agree that post-war demographic changes cemented by the 1970s and 1980s led to increased migration of white Americans from the cities to the suburbs,⁸ which made desegregation less possible in many communities, and thus less relevant to policy debates about improving education.⁹ Moreover, in a series of decisions in the late 1980s and early 1990s, the Supreme Court articulated standards that made it easier for school districts to dismantle court-ordered desegregation plans.¹⁰

3. *Id.*

4. *Id.*

5. See Amy Stuart Wells et al., *How Society Failed School Desegregation Policy: Looking Past the Schools to Understand Them*, 28 REV. RES. EDU. 57, 57–58 (2004) (discussing increased emphasis on standards based reforms and a decreasing emphasis on poverty, inequality and segregation in debates on educational reform) [hereinafter *How Society Failed School Desegregation*].

6. See GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 9–10 (2006) (documenting growing patterns of racial isolation for blacks and Latinos in the 1990s through the 2003–04 school year), available at http://civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf.

7. Gary Orfield, *Segregated Housing and School Resegregation*, in DISMANTLING DESEGREGATION 314–18 (Gary Orfield & Susan E. Eaton eds., 1996) [hereinafter DISMANTLING DESEGREGATION] (describing how arguments about white flight to the suburbs were used to defeat school desegregation policies); see Gary Orfield, *The Growth of Segregation: African Americans, Latinos and Unequal Education*, in *id.* at 61–62 (attributing decrease in white public school enrollment to trends in birth rates).

8. Much evidence shows that these post-war changes are not themselves race-neutral but were the result of federal and state housing policy as well as private discrimination and choices. See, e.g., DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID 42–57 (1993) (detailing the role of private discrimination and state and federal policy in creating the ghetto in the post-World War Two era); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 190–230 (1987) (describing how government policies and subsidies promoted residential segregation, suburbanization, and ghettoization).

9. The Court’s decision in *Milliken v. Bradley*, 418 U.S. 717 (1974), rendered it difficult, if not practically impossible, to launch desegregation efforts across city-suburban district lines, thus taking meaningful racial integration off the map in a number of metropolitan areas.

10. See, e.g., *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991); *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Riddick v. Sch. Bd. of the City of Norfolk*, 784 F.2d 521 (4th Cir. 1986).

Questioning integration's connection to improving educational outcomes has a similarly long history. The common account, which was expressed by Justice Thomas in a series of desegregation decisions in the 1980s and 1990s and again in *Parents Involved*, is that desegregation has not produced good educational outcomes for minority students.¹¹ The tepid academic gains of black students in the early years of school integration (measured by standardized tests in reading and math) seem to support this account.¹² With this evidence of limited achievement gains, Justice Thomas could skeptically characterize integration as intended primarily to erase the psychological harm of segregation, a characterization that, of course, has roots in the psychological evidence that undergirds the *Brown* decision.¹³ As one moved further from legalized segregation, psychological harm seemed less salient and, in a reversal from *Brown*, a rationale that is even denigrating to black children, as Justice Thomas has suggested.¹⁴

Even some integration proponents seem less swayed by the academic benefits than the "citizenship" benefits of *Brown*—that integration helps prepare

11. See *Jenkins*, 515 U.S. at 121–22 (Thomas, J., concurring) ("Moreover, there simply is no conclusive evidence that desegregation either has sparked a permanent jump in the achievement scores of black children, or has remedied any psychological feelings of inferiority black schoolchildren might have had.").

12. Initial post-*Brown* data showed only modest positive effects of desegregation on reading scores of minority students and no improvement in minority math scores. See, e.g., Laurence A. Bradley & Gifford W. Bradley, *The Academic Achievement of Black Students in Desegregated Schools: A Critical Review*, 47 REV. EDUC. RES. 399 (1977); NANCY HOYT ST. JOHN, *SCHOOL DESEGREGATION: OUTCOMES FOR CHILDREN* (1975); Edgar G. Epps, *The Impact of School Desegregation on Aspirations, Self-Concepts and Other Aspects of Personality*, 39 LAW & CONTEMP. PROBS. 300 (1975); but see Crain & Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 LAW & CONTEMP. PROBS. 17 (1978); Robert L. Crain & Rita E. Mahard, *The Effect of Research Methodology on Desegregation-Achievement Studies: A Meta-Analysis*, 88 AM. J. OF SOC. 839 (1983). Although the gap between black and white test scores has narrowed over the past two decades, some studies argue that this resulted more from gains in the socioeconomic status of black families than from desegregation. See David J. Armor, *Why is Black Educational Achievement Rising?*, 108 PUB. INT. 65, 77–79 (1992).

13. That social evidence about the harm of segregation centered on psychological effects has over the years since *Brown* been a particular subject of criticism by legal commentators who have argued that the social science evidence was weak, and that the resort to psychology was unnecessary because the social meaning of segregation was well-understood. See, e.g., Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157–58 (1955) ("I would not have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records."); Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426 (1960) (arguing that the purpose and impact of segregation in the southern regional culture were matters of common notoriety, "matters not so much for judicial notice as for the background knowledge of educated men who live in the world"). Several commentators have argued that the Court should have more explicitly focused on the role of segregation in perpetuating racial caste and hierarchy, see, e.g., *id.* at 429–30, or in denying blacks equal citizenship, see generally KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

14. As Justice Thomas stated in *Jenkins*: "Given that desegregation has not produced the predicted leaps forward in black educational achievement, there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment." 515 U.S. at 121–22 (Thomas, J., concurring). For an account of broader criticisms of integration, see Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 265–68, 269–72 (2006).

students to live in a pluralistic society and reduces prejudice.¹⁵ Some of these characterizations are no doubt strategic. With the Court's acceptance of the diversity rationale for higher education affirmative action in *Grutter v. Bollinger*,¹⁶ voluntary integration in primary and secondary education might have seemed to depend on a compelling interest akin to the diversity rationale. Yet, even apart from strategic considerations, integration's central good often resounds in reducing prejudice and improving citizenship in a diverse society. James Ryan recently noted that the Court's decision in *Parents Involved* would have little effect on educational policy "on the ground" because few school systems have integration plans and most have "moved on" to questions such as school funding, choice, and standards.¹⁷ The loss wreaked by *Parents Involved*, Professor Ryan noted, would be to the notion that schools have any role to play in preparing students for citizenship in a pluralistic society.¹⁸

If racial school integration is to be buried, let it not be without a proper eulogy.¹⁹ *Parents Involved*, if not spelling racial integration's doom, at least renders it more difficult to attain. Yet behind *Parents Involved* is an account that reveals that racial integration is neither entirely futile nor irrelevant to questions of educational equity. The arguments of futility given the current patterns of suburban-urban residential segregation are entirely reasonable. And yet, Jefferson County, Kentucky—one of the school districts at issue in the voluntary integration cases before the Supreme Court—is a strange place to make an argument about school integration's futility, because Jefferson County has long been one of school integration's relative successes. This success lies in the regional, metropolitan nature of the school desegregation and integration plan—the kind of plan that has always augured the most success for school integration²⁰ and which contains the potential to alter the deeply racialized living patterns that make school assignment policies necessary. Moreover, the story of Jefferson County shows how mandatory court orders, federal coercion, local politics, and sustained community mobilization operated to transform a school system from a de jure system of segregation to one of relative integration.

15. See, e.g., James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 132, 142–43 (2007) (stating that "[t]he defense of integration has always been on surer footing when one also considers its social benefits—the ways in which integration can break down or prevent stereotypes and prejudice, lead to long-term relationships across racial and ethnic boundaries, and increase the possibility that students will continue to seek out integrated colleges, workplaces, and neighborhoods") [hereinafter *Voluntary Integration*]; Erica Frankenberg, *Introduction: School Integration—The Time is Now*, in LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICAN SCHOOLS 13–16 (Erica Frankenberg & Gary Orfield eds., 2007) (discussing extensive research focusing on academic benefits of desegregation which showed only modest gains in contrast to much more positive research documenting social and developmental benefits of integrated schools).

16. 539 U.S. 306 (2003).

17. See Ryan, *supra* note 15, at 132.

18. *Id.*

19. With apologies to Justice Stevens. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 577 (2007) (Stevens, J., dissenting) ("If Conley's 'no set of facts' language is to be interred, let it not be without a eulogy.").

20. See *infra* text accompanying notes 84–86.

In addition, the plaintiffs and their allies in *Parents Involved* argued that integration not only serves to diminish racial and ethnic prejudice, and to enhance citizenship, but promotes racial equity in schooling and beyond.²¹ As will be shown below, *Parents Involved* contained the empirical evidence that racial integration improves the short-term and long-term education prospects for minority students. The evidence in *Parents Involved* centered not on stigmatic or psychological harm, but on the claim that racially isolated schools are almost necessarily schools with high levels of concentrated poverty affecting educational achievement (through the production of poor quality schools) and ultimately social mobility.²² While at first glance this may appear to be an argument less about race than about class or poverty, the empirical claims depended on the complex interplay between race and class. Concentrated poverty is always primarily concentrated *minority* poverty, and the harms that flow to “racially isolated” schools depend not just on their poverty status but on their minority status.²³

To argue for integration’s *benefits*, plaintiffs and their allies depended not simply on increasing minority access to the financial resources of predominantly white communities—an argument that inevitably suggests equalization or upgrading of resources in minority schools as an alternative to integration (and may be less than compelling given well-known facts about how much many urban systems spend). Plaintiffs and their amici argued that integration not only provides minority students with access to middle-class schools, but with the less tangible networks of opportunity that attend those schools: peers with new skills, experiences, and expectations for their own achievement; middle-class parents with greater resources for school involvement; familiarity with integrated settings that can create greater comfort in integrated and predominantly white settings.²⁴ This data is related to education’s democratizing function, but in a way that speaks to the core issue of equality: for this data also suggests that if integrated learning can break down racial stereotypes and bias, it may alter public policy by generating greater concern about racial inequality, and alleviating the plight of racial minorities.²⁵

Neither the empirical evidence nor the plaintiff’s account of Jefferson County’s integration journey was enough to secure five votes for sustaining the voluntary integration programs at issue in *Parents Involved*. Much of the case rested on the Justices’ respective views on the constitutionality of explicit racial classifications, and most of the Justices’ positions on that question were well-known from prior affirmative action jurisprudence.²⁶ But examining *Parents*

21. See *infra* notes 143–47 and accompanying text.

22. See *infra* notes 120–36 and accompanying text.

23. See *infra* notes 128–36 and accompanying text.

24. See *infra* notes 143–47 and accompanying text.

25. See *id.*

26. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); see James E. Ryan, *The Limited Utility of Social Science in School Desegregation Cases*, 81 N.C. L. REV. 1659, 1689–90 (2003) (arguing that the social science in support of school integration was too equivocal to alter the Justices’ normative views on the constitutionality of race-conscious government action). In suggesting that the data was equivocal however, Ryan was mostly speaking about data on the short-term effects of desegregation on minority achievement. See *id.*

Involved for what it reveals about integration's relevance to contemporary questions of racial inequality is not offered simply to produce a eulogy. Rather, an examination of this evidence suggests the terms on which racial integration might retain its relevance: not merely to result in cosmetic changes in the levels of school segregation, but as a meaningful attempt to alter both the short-term and long-term structural arrangements that reproduce racial inequity. *Parents Involved* leaves some constitutional space for consideration of voluntary integration in schools, through race neutral and race conscious means.²⁷ In addition, housing law and policy can also serve to promote residential segregation, with possibilities for integration in schools.²⁸ The question is whether integration should remain on the policy agenda, and for what reason.

This article examines *Parents Involved* for the light it sheds on integration's continuing relevance to educational and social equity. Part I examines the story of school integration in Jefferson County and shows how this largely successful metropolitan integration plan challenges claims of racial integration's futility. Part II puts forward the empirical evidence that plaintiffs in *Parents Involved* used in seeking to establish that school boards have a compelling interest in promoting racial integration and avoiding the harm of racially isolated schools. This part argues that the empirical case for racial integration, while not without limitations, moves beyond stigmatization, psychological harm, and the social meaning of segregation, and links integration to equity on the dimensions of school quality and social mobility. This part concludes by examining how empirical arguments might inform integration's future, which I contend is possible primarily through close linkages between housing and school policy. The article concludes by acknowledging that many questions remain unanswered about integration's future role in social policy, but that compelling arguments exist for not wholly abandoning the integration project.

I. PAEAN FOR JEFFERSON COUNTY

School integration's failures are often overstated, but several commentators have noted its successes. Professor James Liebman has argued that, despite conventional wisdom to the contrary, desegregation lawsuits were successful in a large number of school districts.²⁹ Similarly, Professors Jennifer Hochschild and Nathan Scovronick have noted that school integration was, "on balance, an

27. See *Parents Involved*, 127 S. Ct. 2738, 2792 (2007) (stating that school boards may pursue integration through "race conscious" measures such as "strategic site selection of new schools, drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance and other statistics by race"); cf. *American Civil Rights Foundation v. Berkeley Unified Sch. Dist.*, 172 Cal.App.4th 207, 222 (Cal.App. 1 Dist. 2009) (holding that student assignment "which aims to achieve social diversity by using neighborhood demographics when assigning students to Schools" did not discriminate or grant preferential treatment on the basis of race).

28. See *infra* text accompanying notes 160–67.

29. See, e.g., James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1467 (1990) (noting desegregation success stories in Buffalo, Columbus, Dayton, Denver, Minneapolis, St. Louis, San Diego, and Wilmington-New Castle, Charlotte-Mecklenburg, Greenville, Jacksonville, Nashville-Davidson, and Tampa-St. Petersburg, as well as Louisville/Jefferson County).

educational success,” but that “mandatory desegregation was a political failure.”³⁰ Jefferson County is one such location of relative success in terms of levels of stable integration achieved, but also, arguably, of political success as measured by eventual political acceptance of integration remedies. Significantly, Jefferson County provides a better lesson than Seattle School District, whose desegregation efforts were always limited in their scope.³¹

Home to the City of Louisville and its surrounding suburbs, Jefferson County was for twenty-five years subject to court-ordered desegregation after its post-*Brown* integration efforts were deemed constitutionally inadequate by a federal court.³² As discussed below, the initial desegregation lawsuit and, in particular, the prospect of an adverse court ruling prompted the city’s school system to merge with that of the surrounding county. Subsequently, the district court ordered county-wide desegregation involving rezoning schools, introducing magnet schools, and reassigning students (including the use of busing). Initially, the plan was strongly opposed by many whites, as well as some portions of the African-American community, but over time, opposition died down and Jefferson County was soon touted as a model of school integration.³³

As will be discussed, Jefferson County’s experience is instructive on the conditions conducive to successful integration, including: the county-wide nature of the plan, which decreased the possibility of white flight; the active involvement by intermediary organizations—human rights commissions and parent groups in particular—who monitored the school district’s progress and compliance with court-orders, implemented their own reform strategies, and sustained a constituency for change; the significant work of governments and nonprofits to encourage housing integration, which had some effect on decreasing the need for student reassignment; and, eventually, the inclusion of “school choice” elements into the integration plan. Even after the mandatory desegregation order was lifted in 2001, Jefferson County continued its integration efforts, modifying the plan to minimize transportation of students, and to increase choice.

A. History

The Jefferson County school district, which encompasses the city of Louisville and its surrounding suburbs, has long struggled with the question of integration in its primary and secondary schools. Until the *Brown* decision, Kentucky mandated racially separate schools.³⁴ After *Brown*, Kentucky officials

30. JENNIFER HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS* 29 (2003).

31. For a history of school integration efforts in Seattle, see generally *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1167–68 (9th Cir. 2005); FRANK HANAWALT & ROBERT L. WILLIAMS, *THE HISTORY OF DESEGREGATION IN SEATTLE PUBLIC SCHOOLS, 1954–1981* (1981).

32. See *infra* text accompanying notes 45–51.

33. See Gary Orfield, *Segregated Housing and School Resegregation*, in *DISMANTLING DESEGREGATION*, *supra* note 7, at 29; Liebman, *supra* note 29, at 1467.

34. See OMER CARMICHAEL & WELDON JAMES, *THE LOUISVILLE STORY* 39–42 (1957).

ordered the end of a dual school system.³⁵ Kentucky's approach contrasted with the massive resistance launched by many southern states.³⁶ While segregation and racial subjugation thrived in Kentucky,³⁷ by history and temperament the state was characterized by less overt racial hostility than many other southern states, and the City of Louisville in particular was known for its relative liberalism.³⁸ After the *Brown* decision, the Louisville school system conducted a year-long community campaign to ready parents and civic and community leaders for desegregation, and set September 1956 as the date for beginning desegregation.³⁹ In 1956, Louisville launched a plan to abolish the prior dual school system, which required redistricting of elementary and middle schools and the making of student assignments without regard to race.⁴⁰ However, like many other southern school systems, the plan included a "free choice" element, liberally permitting transfers out of assigned schools.⁴¹ The plan met with initial criticism from the black community for its delayed start and "free choice" aspects,⁴² as well as some organized opposition by whites resistant to any form of racial integration.⁴³ Yet in its first year, the Louisville plan could report some success: about half of all black students were attending integrated schools, and only eighteen percent of whites were in all white schools (with the strong caveat that an "integrated" school might contain as few as one student from another race).⁴⁴

This first desegregation effort ultimately failed to achieve stable integration, primarily due to the free choice and transfer policies, as well as demographic changes in housing patterns and white flight: by the early 1970s the schools were

35. *Id.* at 45–49.

36. *See id.* at 3–4, 45–47 (describing Kentucky and Louisville's quiet acceptance of the court's decision in *Brown*).

37. *See, e.g.,* Scott Cummings & Michael Price, *Race Relations and Public Policy in Louisville: Historical Development of an Urban Underclass*, 27 J. BLACK STUD. 615, 615–17 (1997) (describing Kentucky and Louisville's segregationist history and policies).

38. *See, e.g.,* Benjamin Muse, Louisville, 4–5, 7 (June 17, 1964) (unpublished manuscript on file with author) (noting, perhaps too rosily, that "Louisville has long been free from the type of demagogic appeal to race prejudice which has plagued many southern cities" and attributing this to Louisville's "tolerance" and spirit of "liberalism"); CARMICHAEL & JAMES, *supra* note 34, at 14 (discussing Louisville's "climate of tolerance or live-and-let-live"); *see also id.* at 26 ("[I]n a decade of great changes in racial relations largely decreed by the courts, Louisville in some cases 'read the handwriting on the wall' and acted without legal compulsion, in one or two others proceeded without enthusiasm but also without disaster to comply with the law."). To be sure, this characterization is only relative: Louisville resisted full equality for blacks in many areas and black gains in civil rights were the hard-fought result of litigation and protest. *See, e.g.,* Cummings & Price, *supra* note 37, at 632–34.

39. *See* CARMICHAEL & JAMES, *supra* note 34, at 49–70 (describing efforts conducted with parent groups, civic leaders, the media, business and religious organizations); *id.* at 82, 84 (describing the target date).

40. *See id.* at 84–85.

41. *See id.* at 85–86.

42. *See id.* at 82, 86.

43. *See id.* at 90–91.

44. *See id.* at 118–20 (reporting statistics on integration in Louisville during the 1956–57 academic school year).

once again segregated.⁴⁵ In 1971, the Kentucky Chapter of the American Civil Liberties Union (ACLU) and Louisville Legal Aid brought suit against Jefferson County in federal district court to require desegregation of the schools.⁴⁶ In 1972, the ACLU and the Louisville Chapter of the NAACP brought a similar challenge in federal district court against the City of Louisville.⁴⁷ As the cases were being litigated and a desegregation plan appeared imminent, the State Board of Education voted to merge the Louisville and Jefferson County school systems, effective April 1975.⁴⁸ The impetus for merger was, at least in part, the city's fear that mandatory desegregation of the city system alone would lead to the out-migration of whites to county schools.⁴⁹

In July 1975, the district court ultimately issued a county-wide desegregation order for the school year, beginning on September 4.⁵⁰ The desegregation plan required the Jefferson County Public School System (JCPS) to bus about 11,000 white children to predominantly black schools and 11,000 black children to predominantly white schools; ordered redrawing of attendance zones to create "clusters" to group predominantly white schools with predominantly black schools; and, mandated racial guidelines of no less than 14% but no more than 23% black enrollment in JCPS secondary schools and between 12% and 40% black enrollment in elementary schools (this was later changed to between 16% and 35% black enrollment for secondary schools and between 16% and 40% for elementary schools).⁵¹

As in many cities, the Jefferson County desegregation plan met with virulent, and often violent, opposition, mostly from whites throughout the county, requiring for some time the deployment of one thousand national

45. See Marilyn O'Dell, *Desegregation Policies In Louisville, Jefferson County, Kentucky – 1956–1985* 31–32, 36–38 (May 1987) (unpublished dissertation on file with author); KY. COMM'N ON HUMAN RIGHTS, *LOUISVILLE SCHOOL SYSTEM RETREATS TO SEGREGATION* (1972); KY. COMM'N ON HUMAN RIGHTS, *SOUTHERN SCHOOLS – EXCEPT LOUISVILLE – DESEGREGATE SCHOOLS* (1972). By 1969, more than half the city's schools were either 95 percent black or 95 percent white, and the City in 1971 came under investigation by the U.S. Department of Health, Education and Welfare for its segregated schools. See GEORGE K. CUNNINGHAM ET AL., *JEFFERSON COUNTY EDUCATION CONSORTIUM, THE IMPACT OF COURT ORDERED DESEGREGATION ON STUDENT ENROLLMENT AND RESIDENTIAL PATTERNS IN THE JEFFERSON COUNTY KENTUCKY PUBLIC SCHOOL DISTRICT*, FINAL REPORT 19 (1978).

46. See *Newburg Area Council, Inc. v. Gordon*, 521 F.2d 578 (6th Cir. 1975); *Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County*, 510 F.2d 1358 (6th Cir. 1974); *Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County*, 489 F.2d 925 (6th Cir. 1973).

47. See O'Dell, *supra* note 45, at 35–36 (describing suit by the KCLU and the NAACP).

48. See *id.* at 47–49 (detailing state merger decision); Martin M. Perley, *The Louisville Story*, *INTEGRATED EDUC.*, Nov.–Dec., 1975, at 11. Prior to this order, the City had sought merger to address revenue shortfalls due to a shrinking tax base and population loss. See *id.* at 14; see also O'Dell, *supra* note 45, at 20–27 (describing revenue problems and merger proposals of the late 1960s). In addition, the district court judge in the City of Louisville case had ordered the merger of the school systems in a July 1974 order, which was reversed on appeal in light of the Supreme Court's decision in *Milliken v. Bradley*, 418 U.S. 717 (1974), which held that interdistrict remedies could not be ordered without a specific showing of an interdistrict violation.

49. See CUNNINGHAM ET AL., *supra* note 45, at 20–21; O'Dell, *supra* note 45, at 20–21.

50. See *Cunningham v. Grayson*, 541 F.2d 538, 540 (6th Cir. 1976) (affirming district court's desegregation order).

51. See O'Dell, *supra* note 45, at 50; KY. COMM'N ON HUMAN RIGHTS, *SCHOOL AND HOUSING DESEGREGATION ARE WORKING TOGETHER IN LOUISVILLE AND JEFFERSON COUNTY 1975–1983* 4 (1983) [hereinafter *SCHOOL AND HOUSING*].

guardsmen and four hundred state troopers to maintain order.⁵² The Louisville and Jefferson County political leadership had expressed their opposition to busing, and though they agreed to comply with the law, by some accounts they failed to take leadership to ensure peaceful desegregation.⁵³

While the opposition ultimately subsided, success of the desegregation plan in the early years was mixed. Some studies showed that the school desegregation plan led to white residential flight out of Jefferson County, and declining public school enrollment of white students as parents moved their children to private or parochial schools.⁵⁴ Other studies noted increased housing desegregation as a result of the desegregation plan's exemption from busing for residents who made pro-integrative moves, and the County's use of the federal section 8 Housing Assistance voucher program to place black families into suburban communities.⁵⁵ The best read of the data suggests that there might have been an initial period of white flight, but the level of flight dissipated by the late 1970s.⁵⁶ By most measures, in 1980 JCPS was one of the most desegregated school systems in the country, and black students had made striking academic gains as measured by achievement scores in math and reading.⁵⁷ In subsequent years, there were indicia of resegregation of parts of the school system, and indicia of failure to make sufficient gains in faculty and staff desegregation.⁵⁸

While the plan was not perfect, for the most part stable integration was achieved in many JCPS schools.⁵⁹ And significantly, the integration program gained community support. In 1991, the Jefferson County School superintendent proposed dismantling elementary school desegregation.⁶⁰ While some leaders and citizens, both black and white, supported an end to busing and mandatory school assignment policies, there was sufficiently strong opposition from community groups, parents, and the teachers' union that the plan was

52. See O'Dell, *supra* note 45, at 65–67 (describing how buses were pelted with rocks and bricks, some schools experienced bomb threats, and city made over two hundred arrests in the first few days of desegregation); CUNNINGHAM ET AL., *supra* note 45, at 12, 13 (describing marches opposing desegregation plan which attracted as many as 2,500 people, and protestors meeting buses with “brickbats and bottles”); J.M. Wines, *Busing: 5 Years Later*, COURIER-JOURNAL, May 12, 1980, at 1, 4.

53. See O'Dell, *supra* note 45, at 64–65, 90–91.

54. See CUNNINGHAM ET AL., *supra* note 45, at 66, 98–99. It was less clear whether these moves were due to the desegregation plan. The birth rate also declined in the County. *Id.* at 98. The decline in public school enrollment coincided with the implementation of the desegregation plan and those who left disclaimed that anti-black animus had affected their decisions to move, instead claiming concerns about the quality of the schools. See *id.* at 79–83, 99–100.

55. See KY. COMM'N ON HUMAN RIGHTS, HOUSING DESEGREGATION INCREASES AS SCHOOLS DESEGREGATE IN JEFFERSON COUNTY 7–9 (1977).

56. See SCHOOL AND HOUSING, *supra* note 51, at 10.

57. See *id.* at 2–3, 6.

58. See *id.* at 28 (discussing the implementation problems in the 1982–83 year when twenty-five schools were outside the enrollment guidelines, and continued racial identification existed in teacher assignment patterns).

59. See Gary Orfield, *Segregated Housing and School Resegregation*, in DISMANTLING DESEGREGATION, *supra* note 7, at 291, 311–12, 325.

60. See Gary Orfield, *Unexpected Costs and Uncertain Gains of Dismantling Desegregation*, in DISMANTLING DESEGREGATION, *supra* note 7, at 73, 110–11 (suggesting portion of court-order was lifted in 1980).

abandoned.⁶¹ Instead the school district implemented a compromise, altering the desegregation plan to include a magnet school choice plan.⁶²

After the district court declared the school system unitary in 2000,⁶³ JCPS adopted a student assignment plan to maintain and encourage integration, as well as maximize student choice, through a variety of mechanisms including magnet schools, magnet programs, and voluntary transfers.⁶⁴ At that time, the school system was 34% black and about 66% white.⁶⁵ Much like the mandatory desegregation plan, the 2001 plan required that no school have a black student enrollment of less than 15% or of more than 50%.⁶⁶ Other aspects of the plan mirrored the mandatory desegregation plan. JCPS created geographic attendance zones, clustering schools in such a way as to achieve a student population within the racial guidelines.⁶⁷ JCPS also furthered these racial guidelines by managing choice to magnet schools and to magnet programs, to which a student could apply regardless of where they lived.⁶⁸

Thus students were given choices within their cluster, as well as choices about magnet school programs.⁶⁹ JCPS administrators and principals determined how to fulfill students' choices based on student rankings of their preferences, available space, and the racial guidelines.⁷⁰ JCPS also operated schools known as "traditional schools," which offered the same curriculum as non-magnet schools, but also emphasized a structured educational environment, discipline and dress codes, and "concepts of courtesy, patriotism, morality and respect for others."⁷¹ JCPS determined admission to the traditional schools primarily by a student's address and by a lottery system, but the racial guidelines operated here as well.⁷² JCPS separated applications into four lists (black male, white male, black female and white female), and traditional school principals were allowed to draw candidates from the different lists to stay within the racial guidelines for the school.⁷³

61. *See id.*

62. *Id.*

63. *See generally* Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358 (W.D. Ky. 2000) (dissolving the desegregation decree).

64. *See* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 842 (W.D. Ky. 2004).

65. *See* Post-Hearing Brief For Defendants at 4, McFarland v. Jefferson County Pub. Sch., No. 3:032-CV-620-H (W.D. Ky. Feb. 2, 2004).

66. *See* McFarland, 330 F. Supp. 2d at 842.

67. *See id.* At the elementary level and middle school level, most students attend what is effectively their neighborhood school (called a "resides school" under the plan). *Id.* at 842 n.10 (57% of elementary students attend their resides school and 67.5% of middle schools attend their resides schools). Slightly less than half of high school students (49.7%) attended their resides school. *Id.*

68. *See id.* at 843. JCPS operates thirteen magnet schools, eighteen magnet programs within specialized schools, and twenty-two "optional programs" which are small, specialized programs within regular schools. *Id.*

69. The choices are structured slightly differently at the elementary, middle, and high school levels. *See id.* at 844-45.

70. *Id.* at 845.

71. *Id.* at 845-46. There are nine traditional schools (four elementary, three middle, and two high schools) and two resides elementary schools that have traditional programs. *Id.*

72. *See* McFarland, 330 F. Supp. 2d at 847.

73. *See id.* at 845-47.

In 2003, several families challenged the 2001 JCPS plan as violating, primarily, the Fourteenth Amendment's Equal Protection Clause. After holding a five-day hearing in December 2003, the District Court sustained most of the 2001 plan, finding that JCPS had a compelling interest in voluntary integration.⁷⁴ The court found most components of the managed-choice plan to be narrowly tailored to JCPS's interest in furthering integration, but struck down the plan as applied to the traditional schools.⁷⁵ The Sixth Circuit affirmed the ruling, writing only a cursory opinion.⁷⁶ JCPS abandoned its method of considering race for the traditional program.⁷⁷ By the time the Supreme Court granted certiorari in 2006, only one plaintiff remained in the case.⁷⁸

As is well known, the Supreme Court ruled that JCPS's assignment program (as well as that of the Seattle Unified School District) was unconstitutional.⁷⁹ In particular, a majority held that the voluntary integration programs before the Court violated the Fourteenth Amendment. While four Justices (Chief Justice Roberts, and Justices Scalia, Thomas and Alito) would forbid any voluntarily adopted student assignment plans that rely on race,⁸⁰ Justice Kennedy found that integration was a compelling educational goal that a school district may pursue.⁸¹ Thus, there were five votes—including the four Justices in dissent—for allowing the use of race in student assignments, with Justice Kennedy's opinion ultimately controlling on when such programs would be considered narrowly tailored.⁸²

B. Lessons

In sum, JCPS's 2001 integration plan was declared unconstitutional, and thus is no more. All indications are that JCPS will endeavor to pursue racial integration, but through other means.⁸³ The point here is less to bemoan or critique the Supreme Court's decision, but rather to highlight, as a counter to the cloak of despair that has surrounded the concept of school integration, what made JCPS a relative success.

First was the regional, county-wide nature of the plan. As researchers have long noted, county-wide plans are generally more successful because they decrease the potential for white flight: there is literally less of an escape route

74. See *id.* at 837–38.

75. See *id.* at 855–56, 861–64.

76. See *McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513, 514 (6th Cir. 2005).

77. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2749–51 (2007).

78. See *id.* at 2750 n.9.

79. See *id.* at 2760–61.

80. See *id.* at 2758 (Roberts, C.J., plurality opinion).

81. *Id.* at 2789 (Kennedy, J., concurring).

82. *Id.* at 2792 (stating that school systems can pursue racial integration through a variety of means other than individual racial classifications such as “strategic site selection,” “drawing attendance zones with general recognition of the demographics of neighborhoods” and “recruiting students and faculty in a targeted fashion”).

83. See <http://www.jcpsky.net/AboutUs/StudentAssigPlan.html> (describing new student assignment plan); Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES, Jul. 20, 2008, available at <http://www.nytimes.com/2008/07/20/magazine/20integration-t.html> (detailing Jefferson County's plan post-*Parents Involved* to consider class as well as race in student assignment).

through out-migration, and enrollment in private schools is not an option for many parents.⁸⁴ There are certainly downsides to these plans, including the dispersal of black political control over schools into a regional governance system,⁸⁵ but in terms of stabilizing integration, such plans have produced the best results. In addition, there is some indication that the program's regional scope may have contributed to significant achievement gains by increasing not just racial integration, but socioeconomic integration.⁸⁶

In addition, community and civil rights groups, local governments, and the school board exploited the county-wide feature of the plan to promote policies that dismantled the city-suburb spatial divide between blacks and whites and thus began to alter housing patterns. As mentioned above, the desegregation remedy itself included individual incentives for housing integration—for example, exempting attendance zones in adequately integrated communities from busing. This had the effect of minimizing the need for busing which, along with the racial guidelines capping the percentage of black children in a school, might have diminished political resistance by whites to the plan.⁸⁷ The housing integration incentives also decreased housing segregation: data through the early 1980s showed an increase in black residence in predominantly white neighborhoods.⁸⁸ In addition, civil rights organizations and the Kentucky Commission on Human Rights intensified fair housing activity to complement school desegregation.⁸⁹ A particularly notable innovation was a joint program between the Louisville and Jefferson County housing authorities to merge their federal section 8 housing program to provide city residents access to housing outside Louisville.⁹⁰

84. See, e.g., GARY ORFIELD, *MUST WE BUS?* 410–12 (1978); DIANA PEARCE, CTR. FOR NAT'L POL'Y REV., *BREAKING DOWN BARRIERS: NEW EVIDENCE ON THE IMPACT OF METROPOLITAN SCHOOL DESEGREGATION ON HOUSING PATTERNS* 10–12 (1980), available at <http://eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED199309>; Christine H. Rossell, *Desegregation Plans, Racial Isolation, White Flight, and Community Response*, in *THE CONSEQUENCES OF SCHOOL DESEGREGATION* 13–56, 47–49 (Christine H. Rossell & Willis D. Hawley eds., 1983).

85. See ORFIELD, *supra* note 84, at 413–16 (discussing conflicting black attitudes toward metropolitan desegregation).

86. See O'Dell, *supra* note 45, at 93–97.

87. See *SCHOOL AND HOUSING*, *supra* note 51, at 26 (documenting a doubling of the black student population in predominantly white Northeast and Jeffersontown areas of the county between 1974 and 1982); see also Gary Orfield, *Segregated Housing and School Resegregation*, in *DISMANTLING DESEGREGATION*, *supra* note 7, at 325 (stating that the school district was able to exempt 32 schools from busing by 1982 and number of students bused fell from 18,000 to 11,000 without affecting levels of desegregation).

88. See *SCHOOL AND HOUSING*, *supra* note 51, at 24–25.

89. See *id.* at 23 (discussing a 1975 fair housing campaign which used billboards, leaflets, and bumper stickers to inform Jefferson County citizens how housing desegregation can lead to neighborhood exemption from desegregation transportation); see also KY. COMM'N ON HUMAN RIGHTS, *SCHOOL DESEGREGATION SPURS FIRST HOUSING DESEGREGATION GAIN IN FORTY YEARS IN LOUISVILLE AND JEFFERSON COUNTY* 19–21 (1980) (documenting housing desegregation between 1980 and 1984) [hereinafter *FIRST HOUSING DESEGREGATION GAIN*].

90. See *SCHOOL AND HOUSING*, *supra* note 51, at 24 (finding that one of every three black Section 8 families were able to relocate from the city to the county); *FIRST HOUSING DESEGREGATION GAIN*, *supra* note 89, at 27 (attributing housing desegregation gains to section 8 program).

Second, Jefferson County is noteworthy because of the role civic organizations played in shaping the remedy and ensuring public support for the various integration plans. A standard critique of public law reform litigation is that it turns potential stakeholders into bystanders and leads to undue focus on courts as the site of social change.⁹¹ Jefferson County's integration efforts, in contrast, appear to have been characterized by strong involvement of civic and community organizations, and at times by effective partnerships with government. Intermediary civil rights organizations were built into the remedy stemming from the 1975 school integration order. To help implement the order, the Louisville school system used federal grants from the Department of Health, Employment and Welfare (HEW).⁹² These grants helped to fund workshops for teachers; bus drivers and others employed in the school system; hotlines and other efforts to educate the community; and a task force composed of civic and religious organizations to promote peaceful desegregation.⁹³ Through a small grant, the Louisville Human Relations Commission was able to hire a project director tasked with promoting desegregation.⁹⁴

Then, in the years following court-ordered desegregation, the Louisville and Jefferson County Human Relations Commission and the Kentucky Commission on Human Rights actively built community support for the desegregation plan, monitoring the county's compliance with court orders, and evaluating the integration plans for success along a range of dimensions (levels of integration as well as student achievement levels).⁹⁵ No doubt part of these organizations' efforts can be traced to a handful of lively Louisville characters with strong commitments to school and housing integration. For instance, Galen Martin, who served as the executive director of the Kentucky Commission on Human Rights from 1963 to 1989, and also served as head of the Fair Housing Council, was renowned for his decades-long effort to promote school and housing integration in Jefferson County.⁹⁶

But Kentucky also possessed the organizational structures to enable this individual and civic energy. Most notably, Kentucky had several well-established, publicly-funded organizations dedicated to civil rights enforcement and advocacy. The Kentucky General Assembly had established the Kentucky Human Rights Commission in 1960, several years before the federal Civil Rights

91. See, e.g., GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 3 (1992); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2043 n.73 (2008) (collecting sources articulating the "long-standing critique of 'cause lawyering' . . . that it places too much faith in lawsuits and diverts energy from the political strategies that are necessary to secure long-term social change"); see also *id.* at 2043, 2062-65 (discussing contemporary public interest lawyers' awareness of and responses to the limits of litigation).

92. See Perley, *supra* note 48, at 12. The HEW grants and Emergency School Aid grants totaled \$1,880,000. *Id.*

93. See *id.*

94. See *id.* at 13.

95. See, e.g., FIRST HOUSING DESEGREGATION GAIN, *supra* note 89; KY. COMM'N ON HUMAN RIGHTS, VESTIGES OF SEGREGATION REMAIN IN JEFFERSON COUNTY SCHOOLS (1977) (detailing the shortcomings of desegregation attempts in Jefferson County).

96. See Ky. Comm'n on Human Rights, *A Statement from the Human Rights Commission Upon the Death of Galen Martin*, Dec. 20, 2006, <http://migration.kentucky.gov/Newsroom/kchr/Galen+Martin+Death.htm>.

Act of 1964, to address discrimination, civil relations, and issues of inequity.⁹⁷ Kentucky became the first southern state to pass its Civil Rights Act in 1966 forbidding discrimination in public accommodations, education, housing, and other areas, and the Act granted the Kentucky Human Rights Commission primary enforcement authority.⁹⁸ Similarly, Louisville established the Louisville Human Relations Commission in 1962.⁹⁹ This Commission was formed to help combat discrimination in education, employment, and housing in particular, and was charged explicitly “to develop harmonious inter-group and interracial relations” and “to enlist the support of civic, religious, labor, industrial and commercial groups, and civic leaders dedicated to the improvement of inter-group and interracial relations and the elimination of discriminatory practices.”¹⁰⁰ The Louisville Commission later played a role in building civic and parental support for the desegregation plan, as well as in monitoring the results. None of these agencies came into being without effort. They were the product of hard-fought battles led by Kentucky citizens promoting civil rights. Yet Kentucky’s human rights infrastructure, among the first in a southern state, likely helped to support the judicial mandates for desegregation.

A final and related factor that appeared to play a role in the relative success of Jefferson County’s school integration efforts was the interaction of mandatory and voluntary features in shaping of the program. Court-mandated desegregation presents a conundrum. On the one hand, because political officials can essentially shift blame for pursuing integration to courts, court-mandated desegregation has in many cases proven more successful in terms of achieving integration than those voluntarily adopted by political entities.¹⁰¹ Courts can set deadlines and exact penalties for non-enforcement, which are often necessary to force political actors to behave. On the other hand, court mandates can create additional community resentment because of the judiciary’s perceived lack of democratic accountability.¹⁰² In some sense, the existence of active intermediary organizations in Jefferson County might have permitted some of the democratic participation gained in voluntary programs, while court mandates provided an incentive for political action.

The integration program had voluntary elements in another sense. As mentioned above, as both black and white members of the Jefferson County community began to resist busing, political officials increased the use of magnet

97. See Ky. Comm’n on Human Rights, *Who We Are*, <http://kchr.ky.gov/about/aboutkchr.htm> (last visited Feb. 3, 2009) (discussing history of the Kentucky Human Relations Commission).

98. See *id.*

99. See Muse, *supra* note 38, at 7–8, 21–23. The Louisville Human Relations Commission was established on March 27, 1962 by the Louisville Board of Aldermen, and with the backing of the Mayor, after significant pressure from black citizens. See *id.* at 17–18.

100. *Id.* at 27; see also *id.* at 25, 30, 36–38 (describing early efforts to address employment equities, housing discrimination and to prevent white flight from Louisville).

101. See Rossell, *supra* note 84, at 33; O’Dell, *supra* note 45, at 94–96.

102. See HOCHSCHILD & SCOVRONICK, *supra* note 30, at 33–34. Some studies also show greater achievement gains in school systems that employ voluntary integration as compared to those in which integration was mandated. See, e.g., Walter G. Stephan, *Blacks and “Brown”: The Effects of School Desegregation on Black Students*, in SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT 131, 131–33, 153 (Thomas Cook et al. eds., 1984); Lawrence A. Bradley & Gifford W. Bradley, *The Academic Achievement of Black Students in Desegregated Schools: A Critical Review*, 47 REV. OF EDUC. RES. 399, 417, 433 (1977).

schools and magnet programs that seek to encourage integration without mandated student assignment.¹⁰³ After the system was declared unitary in 2001, the choice elements of the plan increased. While the program continued to mandate levels of integration, parents were given a choice of schools within a cluster, as well as choices about educational programs in magnet schools and programs (outside of the usual policy of assignment to neighborhood schools), and in the majority of cases those choices were honored.¹⁰⁴ Studies conducted in Jefferson County shortly after institution of the 2001 plan showed overwhelming support for the choice elements of the integration plan, and strong support (seventy-seven percent of all respondents) for maintenance of the racial guidelines to ensure racial integration.¹⁰⁵ It may be that the choice elements of the integration plan helped maintained political support by increasing overall contentedness with the school system.

More broadly, choice programs suggest an answer to political resistance to integration remedies. In something of a puzzle, studies consistently show high public support for integration, but low support for integration remedies such as busing.¹⁰⁶ The simple answer may be that professed support for integration is either insincere or shallow. But it also may be that remedies that incorporate choice may be more politically palatable than those that rely on mandatory assignment.¹⁰⁷ The record of the JCPS case certainly contains some evidence to support that view. The political success of the Jefferson County program appeared as a rationale when the voluntary integration program was challenged in district court.¹⁰⁸ JCPS's support for the program included expert testimony that the 2001 plan in its use of choice and of racial guidelines made the schools more attractive and generated community support for the school system.¹⁰⁹ JCPS did not make much of this argument in its briefs to the district court, but the district court's opinion, making use of the surveys and the testimony, expounded on this rationale. According to the district court, the evidence supported JCPS's view that students were less likely to flee the public school system to private schools because parents perceived the schools to be roughly equal.¹¹⁰ In effect, the court concluded that the integration program helped to create a system

103. See Gary Orfield, *Unexpected Costs and Uncertain Gains of Dismantling Desegregation*, in DISMANTLING DESEGREGATION, *supra* note 7, at 110–11.

104. See *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 843–45 (JCPS operated thirteen magnet schools, eighteen magnet programs within specialized schools, and twenty-two “optional programs” which are small, specialized programs within regular schools. See *id.* at 843.

105. The survey by the University of Kentucky showed that 97% of parents supported school choice, 82% believed that students benefit from attending racially integrated schools, and 77% (including 89% of blacks) believed that schools should have guidelines to ensure racial diversity. See Post-Hearing Brief of Defendants, *supra* note 65, at 6 (citing defense exhibits 37, 38).

106. See, e.g., Michael Murakami, *Desegregation*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 34 (Nathaniel Persily et al. eds., 2008); Percy Bates, *Desegregation: Can We Get There From Here?*, PHIL. DELTA KAPPAN, Sept., 1990, at 8.

107. See, e.g., James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2057 (2002) (discussing opposition to mandatory interdistrict school assignment policies).

108. See Post-Hearing Brief of Defendants, *supra* note 65, at 6.

109. See *Ryan & Heise*, *supra* note 107.

110. See *McFarland*, 330 F. Supp. at 834.

where all residents felt invested in the public school system. According to the court:

The [JCPS School Board] also believes that school integration benefits the system as a whole by creating a system of roughly equal components, not one urban system and another suburban system, not one rich and another poor, not one Black and another White. It creates a perception, as well as the potential reality, of one community of roughly equal schools.¹¹¹

These statements suggest not just the political acceptance of the plan's choice elements, but a broader transformation from an era of racial segregation to one in which all schools are deemed worthy of equal respect and concern.¹¹² It is difficult to empirically substantiate whether this transformation in the political economy of schools happened in Jefferson County, but to the extent that it did, it points to integration's potentially deep connection to structural equity, which I discuss in the next part.

C. Possibilities

Simply put, JCPS's integration story shows that the quest for integration need not be futile. None of this is to say, however, that JCPS's integration plan achieved perfection. One indication is that Jefferson County, despite decades-long efforts, maintains patterns of housing segregation familiar to most metropolitan areas, with blacks concentrated in the city and whites in the surrounding suburbs.¹¹³ Louisville has features of many large urban cities, including a declining population and a shrinking tax base.¹¹⁴ A perfectly successful school integration plan would likely affect housing integration over the short-term by disincentivizing people from choosing segregated neighborhoods, and over the long-term by diminishing the bias and stigma that might contribute to housing segregation. That this has not fully happened in

111. *Id.*

112. This is similar to Charles Lawrence's argument that *Brown* "is not only about access to resources; it is about the creation of community itself." Charles Lawrence, *Forbidden Conversations: On Race, Privacy and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1378 (2005). According to Lawrence:

[T]he affirmative act of integration, the movement from dual to unitary, is required for the transformation from an established ideology and structure that excludes and demeans black and brown children to one that values and cares for them as members of the larger community. As the community's chosen instrument for the creation and nurture of mutual relationships and the transmission of values, culture, and knowledge, 'public' education creates community and defines its bounds. The transformation of society envisioned by *Brown* cannot be achieved when the location of societal transformation is not held in public trust.

Id. Similarly, James Liebman has described the wrongs of school segregation as rooted in "legislative racism." See Liebman, *supra* note 29, at 1541, 1617-18 (describing "legislative racism" as race-based "political judgments about how organized society should allocate scarce resources, educational and otherwise").

113. See Cummings & Price, *supra* note 37, at 620-22.

114. See *id.* Between 1960 and 1990, Louisville's population declined by thirty-one percent while the population in Jefferson County grew by eighty percent. *Id.* at 622. A majority of the black population of Jefferson County lives in Louisville; and in 1990, blacks constituted only nine percent of the population in Jefferson County outside of Louisville. See *id.*

Louisville and Jefferson County is one indicator of the qualified nature of what we call "success."

Yet, the substantial successes of Jefferson County's integration efforts are worth noting for more than retrospection. To the extent that Justice Kennedy's opinion leaves room for schools to pursue integration, it matters that school systems and advocates for integration are able to argue that integration efforts are not inherently counterproductive or doomed. The implications are probably greatest for domains outside schools, such as housing, where policy discussions about the desirability of racial integration in housing continue.

II. INTEGRATION AS EQUITY

At a basic level, it seems strange to examine racial integration's connection to equity as if it presents a novel argument. After all, *Brown* was fundamentally about ensuring equal educational opportunity for black students.¹¹⁵ Yet today, some argue that *Brown* and the racial integration rationale encapsulated a particular ideal about racial equity and inequity that is outmoded.¹¹⁶ The *Brown* view of the harm caused by segregation, one might argue, depends on social meanings associated with state-sanctioned segregation. Once the state sanction is removed, the negative meaning becomes less salient. Thus, in contemporary popular discourse, the quest for racial integration seems not only irrelevant to quality learning for black children, but also, possibly denigrating to blacks: "Why do black children have to sit next to white children to learn?"

As others have noted, this conception disregards *Brown*'s fundamental notion of equal citizenship: that, at least in this country's historical context, separation had meant a subjugation that is fundamentally at odds with equal citizenship.¹¹⁷ But *Brown*'s reliance on empirical evidence about the psychological harm of segregation rather invited this caricature. Then, in the years following *Brown*, the empirical evidence on integration showed only modest academic gains for black students.¹¹⁸

Against this backdrop, the empirical evidence presented by integration advocates in *Parents Involved* reframed the arguments for integration's benefits and segregation's harms, connecting racial segregation's harms explicitly to the school deficits it produces, and connecting racial integration's benefits not only to short-term academic gains, but to long-term social capital gains for minorities. This empirical evidence permits us to understand with greater specificity, albeit still imperfectly, the mechanisms by which segregation signals and produces harm in schooling today, as well as the role integration can play in producing

115. See Liebman, *supra* note 29, at 1485–88 (discussing equal educational opportunity rationales for *Brown* but arguing that these rationales are rejected in later court desegregation decisions).

116. See, e.g., Williams, *supra* note 2.

117. See C. Edwin Baker, *Neutrality, Process and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1030–48 (1980); Charles Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 430 (1960); Paul Brest, *The Supreme Court—1975 Term, Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7, 34–36, 42 (1976); Kenneth L. Karst, *The Supreme Court—1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5–6 (1977).

118. See *infra* text accompanying notes 137–38.

academic and longer term societal gains for minority students. As acknowledged above, these empirical arguments were not sufficient to allow the Court to sustain the programs at issue in *Parents Involved*. But they might still matter in the significant space that the opinion leaves for exploration of racial integration in schools and in housing.

A. The Ecology of Inequality

In *Parents Involved*, plaintiffs and their amici articulated the familiar interests in reducing prejudice and improving students' preparation to live and work in a racially and ethnically diverse society. Yet the plaintiffs also sought to focus on the precise harms of racially segregated schools to minority achievement.¹¹⁹ As Goodwin Liu has recently noted, there are "difficult methodological challenges" to documenting the relationship between racial segregation and educational inequity.¹²⁰ The harm to educational attainment that plaintiffs emphasized in the *Parents Involved* litigation, and that gained emphasis by advocates in the years prior to the Supreme Court's decision, centers on the connection between racially segregated schools and poverty concentration.¹²¹ This empirical claim received the most attention in the lower court arguments in the challenge to the Seattle voluntary integration plan. In that case, the district also urged an interest, which was not emphasized in the Jefferson County litigation, in avoiding the harms of racially concentrated schools.¹²² Finding a compelling interest in avoiding racial isolation, the court credited research showing that high-minority schools are more likely to have high rates of poverty than are predominantly white schools, and that along with those "high-rates of poverty come lower average test scores, lower levels of student achievement with less-qualified teachers and fewer advanced courses."¹²³ While some high-minority, high-poverty schools do not have these characteristics, the court found that such schools were exceptions.¹²⁴

119. See NAACP LEGAL DEFENSE FUND ET AL., LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION 12-14, 15-17 (2005), available at http://www.naacpldf.org/content/pdf/voluntary/Voluntary_K-12_School_Integration_Manual.pdf. See *infra* text accompanying notes 125-27.

120. See Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277, 292-93 (2007) (discussing studies that separate "the effect of school racial composition from the influence of students' social background and other school and nonschool determinants of learning" and which find strong negative relationships between achievement in particular areas and the percentage of black enrollment).

121. See *infra* text accompanying notes 125-27.

122. The district presented evidence that because of racially segregated housing patterns in Seattle, the use of a neighborhood school assignment policy would result in segregated schools. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1177 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007).

123. See *id.*

124. See *id.* (citing ERICA FRANKENBERG ET AL., CIVIL RIGHTS PROJECT, HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 11 (2003), available at <http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf>).

The harms of concentrated poverty were presented in both the plaintiffs' briefs and the briefs of amici to the Supreme Court in *Parents Involved*.¹²⁵ In short, the plaintiffs presented evidence that these schools have fewer educational resources: in particular, less rich curricula, larger class sizes, poorer facilities, poorer quality teachers and—because of their low-income student population—more educational needs.¹²⁶ Much of this evidence derives from research that is of recent vintage, reflecting recent efforts by educational researchers to understand the ways in which race and class interact to maintain inequality in schools.¹²⁷

At first glance, to understand the harm of segregation in terms of “concentrated poverty” might seem to be less about race than about income or class. Yet such a conclusion would oversimplify the peculiar operation of race in our society, as well as the inseparable confluence of race and poverty. For one thing, some of the problems associated with low-income schools are exacerbated in high-minority schools. Teacher quality is perhaps the most powerful example. Numerous studies have found that teachers play a significant role in promoting student achievement.¹²⁸ Yet high-minority schools tend to have a greater proportion of inexperienced teachers than predominantly white schools.¹²⁹ They also possess teachers who are less-qualified, and experience high teacher turnover.¹³⁰ Studies have shown that race—rather than working conditions, student poverty, or teacher salary—seems to account for teacher mobility.¹³¹

Second, not only are some of the observed deleterious effects of racial isolation associated with the race variable, and not simply with poverty, but the entire condition of poverty concentration exists primarily for blacks and Puerto

125. See, e.g., Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, No. 1, 127 S. Ct. 2738 (2007) (No. 05-908), 2006 WL 2927079, *10–12.

126. See, e.g., CIVIL RIGHTS PROJECT, HARVARD UNIV., WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUITY (2005), available at <http://www.civilrightsproject.ucla.edu/research/deseg/deseg05.php>.

127. See, e.g., SUSAN EATON, THE CHILDREN IN ROOM E4: AMERICAN EDUCATION ON TRIAL 343 (2006) (noting that much of the evidence on the effects of concentrated poverty and segregation as well as the benefits of integration began to be generated in the 1990s).

128. See, e.g., WILLIAM L. SANDERS & JUNE C. RIVERS, CUMULATIVE AND RESIDUAL EFFECTS OF TEACHERS ON FUTURE STUDENT ACADEMIC ACHIEVEMENT 6–7 (1996), available at <http://www.mccsc.edu/~curriculum/cumulative%20and%20residual%20effects%20of%20teachers.pdf>; S. Paul Wright, Sandra P. Horn & William L. Sanders, *Teacher and Classroom Context Effects on Student Achievement: Implications for Teacher Evaluation*, 11 J. PERSONNEL EVAL. IN EDUC. 57, 63–66 (1997).

129. See PATRICK M. SHIELDS ET AL., CTR. FOR THE FUTURE OF TEACHING AND LEARNING, THE STATUS OF THE TEACHING PROFESSION 24 (2005); SUSANNA LOEB & MICHELLE REININGER, EDUC. POLICY CTR., PUBLIC POLICY AND TEACHER LABOR MARKETS: WHAT WE KNOW AND WHY IT MATTERS i–iii (2004); Linda Darling-Hammond, *The Color Line in American Education: Race, Resources, and Student Achievement*, 1 DU BOIS REV. 213, 218–19 (2004); Catherine Freeman, Benjamin Scafidi, & David Sjoquist, *Racial Segregation in Georgia Public Schools, 1994–2001: Trends, Causes and Impact on Teacher Quality*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 148 (John C. Boger & Gary Orfield eds., 2005).

130. See JENNIFER B. PRESLEY, BRADFORD R. WHITE, & YUQIN GONG, EXAMINING THE DISTRIBUTION AND IMPACT OF TEACHER QUALITY IN ILLINOIS 17–18 (2005); Susanna Loeb, Linda Darling-Hammond, & John Luczak, *How Teaching Conditions Predict Teacher Turnover in California Schools*, 80 PEABODY J. OF EDUC. 3, 44, (2005); Benjamin Scafidi et al., *Race, Poverty and Teacher Mobility*, 26 ECON. EDUC. REV. 145, 149, 157–58 (2007); see also Liu, *supra* note 120, at 295–98.

131. See Scafidi et al., *supra* note 130, at 157–58.

Ricans.¹³² This poverty concentration is not simply the result of higher rates of poverty among these groups, but is also the result of racial discrimination in private housing markets, and federal, state, and local housing policy that has the effect of creating racially segregated, low-income ghettos.¹³³ For the most part, poor white Americans do not live in neighborhoods of high poverty concentration.¹³⁴ While poor whites might experience all the significant constraints associated with poverty, they are more likely to live in neighborhoods that provide them access to middle-class schools and other resources.¹³⁵ In addition, the poverty levels of schools correlate strongly with race. Because of the effects of residential segregation and other factors, black middle-class students tend to live in communities and attend schools with higher concentrations of poverty than their white counterparts.¹³⁶

B. Long Term Benefits as Social Capital

Early desegregation research showed only a modest positive impact on African-American achievement as measured by test scores. These early studies found modest positive gains in reading for black students, but no effect on math scores.¹³⁷ There may be convincing explanations for these tepid results. Many of these studies were conducted in the very early years of desegregation and failed to account for the school conditions and context surrounding desegregation, including community resistance to desegregation, hostility by white teachers, the existence of within-school tracking, the age at which black students had been integrated, and whether the desegregation plans were voluntary or court-ordered.¹³⁸

Given this research, as a matter of strategy integration advocates might simply shift emphasis to benefits better supported by the empirical evidence: that school integration produces beneficial long-term effects for both black and white students in terms of racial attitudes and ability to interact with those of

132. See, e.g., MASSEY & DENTON, *supra* note 8, at 118–25, 144; see also *id.* at 114 (describing studies showing higher levels of housing discrimination faced by dark-skinned Hispanics as compared to those with lighter-skin).

133. See *infra* text accompanying note 5.

134. See MASSEY & DENTON, *supra* note 8, at 118, 124–25, 130.

135. See *id.* at 125, 130.

136. See Erica Frankenberg, *Introduction: School Integration—The Time is Now*, in LESSONS IN INTEGRATION, *supra* note 15, at 9.

137. See, e.g., David J. Armor, *The Evidence on Desegregation and Black Achievement*, in SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT, *supra* note 129, at 43, 58; Norman Miller & Michael Carlson, *School Desegregation as a Social Reform: A Meta-Analysis of its Effects on Black Academic Achievement*, in SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT, *supra* note 102, at 89, 96, 104.

138. See Wells et al., *How Society Failed School Desegregation*, *supra* note 5, at 66–67. Several later studies on academic achievement during desegregation were able to identify some of the conditions that helped produce achievement gains. For instance, greater achievement gains occurred when blacks were integrated into schools with better teachers, stronger curricula, and higher expectations for students. See *id.* at 68; Gary Orfield, *Foreword*, in LESSONS IN INTEGRATION, *supra* note 15, at 2 (describing segregated classes, discriminatory teacher assignment, discriminatory counseling, and other conditions limiting the social and academic experiences of students in the early years of desegregation); Crain & Mahard, *supra* note 12, at 17, 18, 34.

other races.¹³⁹ The Supreme Court's emphasis on diversity in the higher education affirmative action context might also have encouraged researchers to focus on the benefits of integrated environments to white students, and towards the reduction of racial stereotypes.¹⁴⁰ In many ways, Justice O'Connor's opinion in *Grutter* articulated a much more robust view of the diversity rationale, one connected to fundamental structural arrangements in our democracy.¹⁴¹

Yet to rely on the affirmative action jurisprudence's articulation of diversity benefits—usually conceived as improvements to interracial understanding, classroom discussion, and critical thinking skills—would forgo establishing an empirical basis for what many of us know anecdotally: that minorities who experience great socioeconomic mobility or who gain access to elite universities and other elite settings are more likely to have gone to integrated schools. It also invites a concept of integration as unconcerned about black achievement—much as Justice Thomas expressed in his opinion in *Parents Involved* when he concluded integration was not about black achievement gains—but rather with elitist arguments for cultural diversity.¹⁴²

The research on long-term effects of school desegregation on graduates also bears a non-speculative relation to educational achievement for minorities. In particular, data suggests that minorities who attend integrated schools are not simply gaining changes in attitudes or the ability to get along with others of different races, they also gain great life successes. For example, researchers Amy Stuart Wells and Robert Crain have reviewed a number of studies finding that, controlling for variables such as test scores, and socioeconomic status, African-American graduates of desegregated high schools earned higher degrees—and eventually gained more social mobility and income—than graduates of segregated high schools.¹⁴³

139. Cf. Janet W. Schofield, *School Desegregation and Intergroup Relations, A Review of the Literature*, 17 REV. RES. EDUC. 335, 339 (1991) (encouraging shift away from research focused on academic achievement to research on the effect of desegregation on intergroup relations).

140. See Frankenberg, *supra* note 15, at 15 (describing evidence supporting diversity in higher education which was marshaled for the *Grutter* and *Gratz* cases); ANGELO N. ANCHETA, SCIENTIFIC EVIDENCE AND EQUAL PROTECTION OF THE LAW 13 (2006) (describing research on educational benefits of diversity spawned by Justice Powell's articulation of the diversity interest in *Bakke*).

141. See *Grutter v. Bollinger*, 539 U.S. 306, 331–32 (2003). The majority opinion in *Grutter*, by Justice O'Connor, contends that racial diversity improves classroom interactions, but also that it ensures the democratic legitimacy of our institutions. *Id.* As Justice O'Connor puts the point: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training." *Id.* at 332. For a discussion of Justice O'Connor's expansion of *Bakke*'s notion of "diversity," see Lani Gunier, *Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV. 113, 175 (2003) (contending that Justice O'Connor's "opinion for the Court affirmed that the conversation about racial diversity extends beyond the classroom to include the fundamental role of public education in a democracy").

142. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. at 2776–77 (Thomas, J., concurring) (2007); see also Ryan, *supra* note 15, at 131 (noting these arguments).

143. See Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. RES. EDUC. 531, 552 (1994); see also Jomills Henry Braddock II & James M. McPartland, *How Minorities Continue to Be Excluded From Equal Employment Opportunities*, 43 J. SOC. ISS. 5, 9–12 (1987).

The mechanics that produce these effects are less than clear. As several researchers have noted, the findings on long-term effects indicate little about “how and why these outcomes occurred in desegregated high schools.”¹⁴⁴ Jomills Braddock has described school integration as a counter to “perpetuation theory,” a term Braddock coined in 1980 to explain that blacks who have been raised in segregated settings will tend to avoid integrated settings because they anticipate hostility.¹⁴⁵ Braddock, Wells, and Crain have also suggested that integrated schools might lead to peer and adult networks that provide information about educational and employment opportunities, and that are necessary to promote socioeconomic mobility in our society.¹⁴⁶ Closely related mechanisms that might explain how integration improves long-term outcomes are employers’ greater comfort with applicants who have attended majority white schools, and the reputation of majority white schools among employers and higher education institutions.¹⁴⁷ While more needs to be known about how integrated schools and integrated peer networks operate in this context, what Wells and Crain have described is an enhancement of social capital—a term I use broadly to mean the resources and networks necessary for educational and social development.¹⁴⁸ The emphasis here is not simply on improvement of interracial cooperation, but on the improvement of life chances and social mobility through the networks developed in integrated settings.

It may be that data about social capital benefits will have limited ability to link racial integration to contemporary questions of racial equity. Much like the citizenship benefits from interracial contact, these social capital benefits require one to look beyond educational achievement as measured by test scores, to the role of schools in disrupting segregation patterns and in producing longer-term social equity and inclusion for blacks. As the asserted mission of schools narrows to test score achievement, social capital arguments may do no better job of resuscitating public support for integration, just as the citizenship benefits achieved through interracial contact are not seen as related to the purposes of

144. Wells et al., *How Society Failed School Desegregation*, *supra* note 5, at 69.

145. See Jomills Henry Braddock II, *The Perpetuation of Segregation Across Levels of Education: A Behavioral Assessment of the Contact-Hypothesis*, 53 SOC. EDUC. 178, 179, 181 (1980).

146. See Wells & Crain, *supra* note 143, at 552.

147. See, e.g., *id.*; see also Wells et al., *How Society Failed School Desegregation*, *supra* note 5, at 69.

148. See Glenn Loury, *Essays in the Theory of the Distribution of Income* 20 (May 17, 1976) (unpublished dissertation on file with author) (encouraging the consideration of “social capital”—“the consequences of social position in facilitating individual acquisition of (say) the standard human capital characteristics”—in understanding income differences between whites and African-Americans); Glenn Loury, *Discrimination in the Post-Civil Rights Era: Beyond Market Interactions*, 12 J. ECON. PERSP. 117, 199–20 (1998) (discussing effects of social networks in limiting employment opportunities for blacks). I acknowledge some risk in abusing the term “social capital,” which has a variety of overlapping meanings in the political science and sociological literature. See, e.g., Robert Putnam, *Tuning In, Tuning Out: The Strange Disappearance of Social Capital in America*, 28 POL. SCI. & POLS. 664, 664–65 (1995) (describing social capital as “features of social life—networks, norms and trust—that enable participants to act together more effectively to pursue shared objectives”); ROBERT PUTNAM, *BOWLING ALONE* 19–23 (2001) (describing development of the term social capital); Alejandro Portes, *Social Capital And Its Origins In Modern Sociology*, 24 ANN. REV. SOC. 1, 2 (1994) (stating that the term “social capital” is “being put to severe tests by . . . increasingly diverse application” and that the term simply embodies a “staple notion” in sociology that “involvement and participation in groups can have positive consequences for the individual and the community”).

education.¹⁴⁹ Further strengthening of social capital arguments would require a better understanding of the relation between traditional short-term measures of achievement and the long-term social capital achievement measures. This understanding might shed light on the past and the future of school integration in Jefferson County itself. Integration, as discussed earlier, was relatively successful in Jefferson County as measured by levels of school integration, initial achievement score gains, and the long-term effects on graduates,¹⁵⁰ but a significant racial achievement gap, though narrowed, still remains.¹⁵¹

Looking at the social capital benefits for minorities who attend integrated schools also might allow us to revisit and reframe the citizenship benefits gained by interracial contact as capable of addressing racial inequality. If, as in Braddock's account, African-Americans attending integrated schools gain a comfort that permits them to function more broadly in integrated settings, then whites also gain benefits in the reduction of their prejudice and greater comfort and contact with blacks and other minorities.¹⁵² One might hope, then, that "perpetuation" operates for whites as well, with ramifications for racial equity. Greater comfort in integrated settings might increase movement towards racial integration in schools, housing, and employment, as well as increasing willingness to support policies that aid minorities and which might alter structural racial arrangements.

C. Integration Imperatives

Given that the equity-related arguments for racial integration did not persuade the Court, the question going forward is the continuing relevance of the equity framework to broader, contemporary policy discussions on racial integration. In my view, the equity-based arguments in *Parents Involved* could remain powerful if shifted to correspond to the current policy—as opposed to litigation—environment.

In the *Parents Involved* litigation, empirical evidence on integration's relationship to educational and social equity was introduced to make the case that integration was a compelling interest.¹⁵³ The framing of this empirical

149. See Ryan, *supra* note 15, at 144 (arguing that benefits of intergroup cooperation and prejudice reduction "are no longer included in most conversations about the mission of public schools").

150. See Amy S. Wells et al., *Refusing to Leave Desegregation Behind: From Graduates of Racially Diverse Schools to the Supreme Court*, 110 TEACHERS COLLEGE RECORD 12 (2008) (qualitative study of seventeen graduates of integrated high schools in Jefferson County reporting greater comfort in integrated settings than their peers, which they believe enhanced their ability to participate in a global economy); see also Brief of Profs. Amy Stuart Wells et al. as Amici Curiae in Support of Respondents, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915), 2006 WL 2927074, * 17 (citing this study among other studies showing benefits of integration).

151. See COUNCIL OF GREAT CITY SCHOOLS, BEATING THE ODDS VIII, CITY-BY-CITY PROFILES, <http://www.cgcs.org/BTO7/Jefferson.pdf> (citing U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, COMMON CORE OF DATA PUBLIC ELEMENTARY/SECONDARY SCHOOL UNIVERSE SURVEY (2006)) (showing an increase in the reading and math proficiency of black fourth graders between 2001 and 2006 but that a black-white achievement gap of more than 20 points remains).

152. See, e.g., Frankenberg, *supra* note 15, at 16–17.

153. Cf. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. at 2821–22 (Breyer, J., dissenting) (discussing social science supporting integration as a compelling governmental interest).

evidence to ward off an equal protection challenge—and to satisfy narrow tailoring—need not constrain future policy discussions on exploring integration's current relevance and efficacy.

To argue that racial integration must be connected to questions of structural equity is not to suggest that racial integration is a requirement for educational gains for minority students. It may be, as some integration advocates urge outside the strictures of equal protection litigation, that integration is the only route to substantial educational gains for disadvantaged minorities: that other school reforms will be unsuccessful without racial integration.¹⁵⁴ Yet to adopt this view, integration advocates must grapple more directly with what Jim Ryan notes is education policy's move away from racial integration to questions of "school funding, public school choice, charter schools, vouchers, standards and testing, and universal access to preschool,"¹⁵⁵ as well as the fact that some of these other policy interventions are bearing fruit for minority children.¹⁵⁶ Strategies to achieve racial integration may be complimentary with many of these other interventions, such as improvements in teacher quality and access to preschools, but it stands in greater tension with some charter school reforms directed at poor students in particular.

Some charter schools appear not only to consider integration irrelevant to their model, they also advance educational approaches that assume that different educational interventions (such as increased school time) might be required to produce educational improvements for low-income minority students as opposed to middle-class students. I do not pretend to resolve these debates on educational imperatives, which appear to be in dispute even among educational policy experts. Rather, I contend that one might justify integration on educational and socioeconomic equity grounds, and still leave room for other interventions targeted at underachieving minority children.

In the policy (as opposed to litigation) context, racial integration must address arguments that socioeconomic integration provides an alternative to race based assignment.¹⁵⁷ In the equal protection argument of the school districts, socioeconomic integration was cast as an inadequate alternative because it would

154. See Orfield, *Forward*, in LESSONS IN INTEGRATION, *supra* note 15, at 6.

155. See Ryan, *supra* note 15, at 142–43.

156. See, e.g., Janet Currie, *Early Childhood Intervention Programs: What Do We Know?*, 15 J. ECON. PERSP. 212 (2001); Jens Ludwig & Douglas L. Miller, *Does Head Start Improve Children's Life Chances? Evidence from a Regression Discontinuity Design*, 122 QUAR. J. ECON. 159 (2007). The overall success of charter school interventions as compared to public schools is mixed. See NAT'L CTR FOR EDUC. STAT., A CLOSER LOOK AT CHARTER SCHOOLS USING HIERARCHICAL LINEAR MODELING vi (2006) (analyzing 2004 and 2006 data and finding that traditional public schools outperform charter schools on reading and math standardized tests). Some charter schools, most famously the Knowledge is Power Program Schools (KIPP) have shown significant success in improving test scores of urban, mostly black students. See Steven M. Ross et al., *Achievement and Climate Outcomes for the Knowledge is Power Program in an Inner-City Middle School*, 12 J. OF EDUC. FOR STUD. PLACED AT RISK, 137, 137 (2007). While charter school admission is lottery-based, rigorous programs may select out less motivated or prepared students and their families. See Erik W. Robelen, *KIPP Success Cited, With Caveats*, EDUC. WEEK., Nov. 12, 2008.

157. See, e.g., RICHARD D. KAHLENBERG, CENTURY FOUNDATION, RESCUING BROWN V. BOARD OF EDUCATION 3 (2007) (discussing socioeconomic integration as a response to the *Parents Involved* decision).

not produce racial integration.¹⁵⁸ But in the larger policy debates this argument is less adequate. If higher levels of poverty are a chief harm of racially segregated schools, then this is one that socioeconomic integration would appear to directly address. With socioeconomic integration as an option, racial integration appears necessary only to promote intergroup cooperation benefits, benefits that have political limitations.

One response might be the increased production of research (such as the teacher quality data referenced earlier) to show how race functions apart from income to maintain inequality. One might also encourage increased attention, as discussed earlier, to the *mechanisms* that produce long-term benefits and social capital gains for graduates of racially integrated schools. But even these efforts are unlikely to account for the complex ways in which race operates, and thus suggest the limits of any empirical argument for racial integration. The complex functioning of racial inequality—which serves to limit social mobility and to stigmatize¹⁵⁹—is not easy to quantify. Also, the benefits of racial integration, in transforming opportunities for previously disadvantaged minorities, and the political economy of concern for the problems of minorities might similarly elude empirical analysis.

Finally, if racial integration appears to be waning in terms of school district support for race-based student assignment policies, more emphasis should be put on the problem of residential segregation and the socioeconomic fragmentation of metropolitan areas.¹⁶⁰ Indeed, *Parents Involved*, by decreasing the range of constitutional school integration policies, would seem to shift attention to the problem of residential segregation. School reform advocates might be less focused on school integration today, but rich debates and commentary continue in the housing field where claims of residential segregation's harms often center on its deleterious effects on school quality and minority educational achievement.¹⁶¹

Addressing residential segregation, however, should not be mistaken for the simpler course of action. The factors contributing to residential segregation are many, including past and present government policy, discrimination in private markets, and exclusionary zoning, and though there is no dearth of policy proposals to address the problem, insufficient progress has been made on

158. See, e.g., Brief for Respondents, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915), 2006 WL 2944684, at * 47–48 (discussing inadequacy of race-neutral alternatives such as socioeconomic integration).

159. See WILLIAM JULIUS WILSON, *THE BRIDGE OVER THE RACIAL DIVIDE* 98 (2001) (discussing the “social structure of inequality”); GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 92–93, 160, 166 (2002) (discussing stigma as a way to understand persistent inequality); see R.A. Lenhardt, *Understanding the Mark: Race, Stigma and Equality in Context*, 79 N.Y.U. L. REV. 803, 809 (2004) (arguing that racial stigma rather than intentional discrimination should be seen as the main source of racial harm).

160. For recent discussions of both, see generally SEGREGATION, *THE RISING COSTS FOR AMERICA* (James H. Carr & Nandinee K. Kutty eds., 2008); *THE GEOGRAPHY OF OPPORTUNITY* (Xavier De Souza Briggs ed., 2005).

161. See, e.g., Xavier De Souza Briggs, *More Pluribus, Less Unum?: The Changing Geography of Race and Opportunity*, in *THE GEOGRAPHY OF OPPORTUNITY*, *supra* note 160, at 29–34.

increasing housing integration.¹⁶² Moreover, residential segregation cannot simply be described as the cause of school segregation. Rather, the relationship between school and housing segregation is one of mutual dependence. Families with resources choose neighborhoods based on the racial and ethnic composition of the schools, the percentage of poor students, as well as the actual and perceived quality of those schools.¹⁶³ Real estate agents market neighborhoods on the basis of schools, and often accomplish racial steering by directing prospective homeowners based on the racial and ethnic composition of the neighborhood's schools.¹⁶⁴ For these reasons and more, the demographic group most resistant to racial integration in housing consists of families with school-age children.¹⁶⁵ At the same time, racial integration and improving school quality can promote racial and socioeconomic integration. Much data shows that the stability of integration in neighborhoods depends in part on the stability and extent of the integration in schools,¹⁶⁶ and incompletely desegregated school systems can exacerbate residential segregation.¹⁶⁷ This mutually dependent relationship between school and housing segregation suggests the need for increased attention to the ways in which housing and school policies interact to reinforce segregation as well as to decrease quality school and housing opportunities for too many poor minorities.

CONCLUSION

In the end, it may be easier to argue that integration matters for equity than to figure out how to achieve it—given what the Supreme Court's school desegregation law has bequeathed us, and given current patterns of residential segregation. After all, while Jefferson County shows that integration is not necessarily futile, many of the most promising reforms have occurred in metropolitan school districts. If the integration conversation is to remain alive, it

162. See, e.g., CHRISTOPHER BONASTIA: KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT'S ATTEMPT TO DESEGREGATE THE SUBURBS 165 (2006) (despairing that the federal government is unlikely to meaningfully address residential segregation).

163. See Erica Frankenberg, *The Impact of School Segregation on Residential Housing Patterns, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 164 (2005) [hereinafter *Residential Housing Patterns*]; Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177 (2002) (study finding that high-status (white and wealthy) parents tend to move to white school districts or closer to predominantly white schools because of the information gained from social networks about the quality schools).

164. See PEARCE, *supra* note 84, at 10–12.

165. See Ingrid Gould Ellen, *How Integrated Did We Become During the 1990s?*, in FRAGILE RIGHTS WITHIN CITIES 137 (John Goering ed., 2008).

166. See, e.g., PEARCE, *supra* note 84, at 4 (1980) (finding that metropolitan school desegregation “not only unhooks school racial composition from neighborhood composition . . . [i]t also neutralizes and may even reverse the incentives in the housing market”); INST. ON RACE AND POVERTY, MINORITY SUBURBANIZATION, STABLE INTEGRATION, AND ECONOMIC OPPORTUNITY IN FIFTEEN METROPOLITAN REGIONS (2006), available at http://www.irpumn.org/uls/resources/projects/Minority_Suburbanization_full_report_032406.pdf (study of fifteen metropolitan areas finding more stable residential integration in regions that employed large-scale busing for school integration from 1980 to 2000).

167. See Frankenberg, *Residential Housing Patterns*, *supra* note 163, at 165, 181 (finding that where a large proportion of racially identifiable schools remain in a school system it can contribute to greater levels of residential segregation).

is likely to reside in efforts that address residential segregation and that link housing to schools: in promoting school reform policies that encourage racial integration, and in establishing housing policies that stabilize integration in both housing and schools. This article's contribution is less to answer all the questions about how this task should be accomplished—although we have many good models to point the way, including linking mixed income housing development to school reform efforts, and ensuring that the siting of subsidized housing promotes school integration¹⁶⁸—but to urge that racial integration remains in the national conversation about how to address contemporary racial inequity.

168. See generally JOHN A. POWELL ET AL., COMMUNITIES OF OPPORTUNITY: A FRAMEWORK FOR A MORE EQUITABLE AND SUSTAINABLE FUTURE FOR ALL (2007), available at <http://kirwaninstitute.org/publicationspresentations/publications/index.php> (detailing the "Communities of Opportunity" framework, which proposes to fix disparities through fair housing and community development); Deborah L. McKoy & Jeffrey M. Vincent, *Housing and Education: The Inextricable Link*, in SEGREGATION: THE RISING COSTS FOR AMERICA 125, 134–44 (James H. Carr ed., 2008) (discussing federal, state, and local policy interventions to link school and housing reform); Frankenberg, *Residential Housing Patterns*, *supra* note 163, at 178 (noting efforts in Charlotte Mecklenburg county to link housing and school policy, including by ensuring that public housing is located in areas that help promote integration in schools).